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SENATE

{ REPORT
109-304

EXTENSION FOR HYDROELECTRIC PROJECT IN THE STATE OF IDAHO

JULY 31, 2006.—Ordered to be printed

Mr. DOMENICI, from the Committee on Energy and Natural
Resources, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 2035]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2035) to extend the time required for construction of a hydroelectric project in the State of Idaho, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

On page 2, line 6, strike “expired” and insert “has been terminated”.

PURPOSE OF THE MEASURE

The purpose of S. 2035 is to extend the time required for commencement of construction of the Arrowrock Dam Project in the State of Idaho, and for other purposes.

BACKGROUND AND NEED

Section 13 of the Federal Power Act (FPA) requires that the construction of a licensed project commence within two years from the date the license is issued. The Federal Energy Regulatory Commission (FERC or Commission) is authorized under the FPA to extend this deadline once, for a maximum of two additional years, upon a finding that such extension is “not incompatible with the public in-

terest.” Consequently, a license is subject to termination if a licensee fails to begin construction within four years after the date the license is issued, unless legislation authorizing an additional extension is enacted.

ON MARCH 27, 1989, FERC granted five Idaho irrigation districts (the Boise-Kuna Irrigation District; the Nampa & Meridian Irrigation District; the New York Irrigation District; the Wilder Irrigation District; and the Big Bend Irrigation District, hereinafter, the Districts) a license to construct and operate the Arrowrock Dam Project No. 4656 (Arrowrock Project or Project). The Project is to be located at the U.S. Bureau of Reclamation’s Arrowrock Dam and Reservoir on the Boise River, in Elmore and Ada Counties, Idaho. As originally licensed, the 60-MW Project was to include two 30-MW generating units and two 180-foot-long penstocks, which would pass through tunnels constructed through the dam.

The Project’s original construction commencement deadline of March 26, 1991 was extended by FERC to March 26, 1993. In 1992, Congress further extended the deadline to March 26, 1999 (P.L. 102-486). In 2000, Congress again extended the deadline to March 26, 2005 (P.L. 106-343).

On March 25, 2005, the Districts requested FERC to stay the license and backdate the stay for 120 days to allow additional time for compliance. On May 27, 2005, the Commission denied the request and notified the Districts of the probable termination of the license. The Districts timely filed a request for rehearing. On September 1, 2005, FERC denied the rehearing request. However, the license for Project No. 4656 has not yet been terminated.

According to the Districts, the March 26, 2005 deadline was not met because the U.S. Fish and Wildlife Service would not begin Endangered Species Act consultation on the Arrowrock Project for Columbia River bull trout and bald eagles until after the agency completed consultation on the U.S. Bureau of Reclamation Projects in the Upper Snake River Basin. This Upper Snake River consultation was prioritized due to the requirements of the Snake River Water Rights Act of 2004 and the Nez Perce Agreements of 2004.

Moreover, the Districts now contemplate a 15-MW project, consisting of two 7.5 MW generating units. With this smaller project, there would be no penstock or tunneling through the dam. Instead, the generating units would receive water through existing valves downstream of the dam. The Districts argue that the new design will significantly reduce any environmental impacts from the Arrowrock Project.

S. 2035 would extend the time for construction commencement for an additional three year period beginning on the date of enactment, or, if the license for the project has been terminated, the bill would reinstate the license and extend the construction commencement period for an additional three years.

The last several Chairmen of the Commission have had a policy of opposing legislation extending commencement of hydropower project construction deadlines that would allow an entity more than 10 years to develop a project. However, that policy has been based on the notion that allowing an entity that is not showing progress in developing a project to control a hydropower site for a

greater length of time is not consistent with the public interest in developing clean, renewable hydroelectric energy.

It has taken more than 16 years for the licensees to develop this project. However, the Committee received testimony and voluminous exhibits from proponents of the Arrowrock Project indicating their readiness to begin construction within the near future, and outlining the reasons for the delays, some of which were either directly or indirectly caused by other Federal Government actions. The licensees have also finalized a power sales agreement with the Clatskanie Public Utility District in Oregon to take power from the plant. In addition, FERC has indicated that an updated environmental review of the Project will be conducted pursuant to applicable law.

LEGISLATIVE HISTORY

S. 2035 was introduced by Senators Craig and Crapo on November 17, 2005, and referred to the Committee on Energy and Natural Resources. The Water and Power Subcommittee held a hearing on S. 2035 on March 30, 2006. At the business meeting on May 24, 2006, the Committee on Energy and Natural Resources ordered S. 2035 favorably reported, with an amendment.

H.R. 4377, the companion measure to this bill, was introduced by Representative Otter (R-ID) on November 17, 2005, and referred to the House Energy and Commerce Committee.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on May 24, 2006, by voice vote of a quorum present, recommends that the Senate pass S. 2035, if amended as described herein. Senator Bingaman asked to be recorded as voting against the measure.

COMMITTEE AMENDMENT

An amendment was adopted to strike the term “expired” on page 2, line 6, and insert “has been terminated.”

SECTION-BY-SECTION ANALYSIS

Section 1 directs FERC, upon the request of the licensee for the project numbered 4656, to extend the time required for construction commencement of the project for an additional three year period beginning on the date of enactment. If the license for the project has been terminated prior to Congressional action, FERC is directed to reinstate the license and extend the period for construction commencement for an additional three years after the date of enactment.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office.

S. 2035—A bill to extend the time required for construction of a hydroelectric project in the state of Idaho, and for other purposes

S. 2035 would authorize the Federal Energy Regulatory Commission (FERC) to extend the deadline for commencing construction of

a hydroelectric project (number 4656) in Idaho by up to three years. CBO estimates that implementing S. 2035 would have no net effect on the federal budget. The bill would have a minor impact on FERC's workload. Because FERC recovers 100 percent of its costs through user fees, any change in its administrative costs would be fully offset by an equal change in the fees that the commission charges. Because FERC's administrative costs are limited in annual appropriations, the bill would not affect direct spending or revenues.

S. 2035 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act. The bill would benefit water districts in Idaho by authorizing the reinstatement and extension of their license for construction of a hydroelectric project. Any costs they might incur would result from complying with conditions for receiving federal assistance.

The CBO staff contact for this estimate is Megan Carroll. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2035. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2035, as ordered reported.

EXECUTIVE COMMUNICATIONS

The testimony provided by FERC at the Subcommittee hearing on S. 2035 follows:

STATEMENT OF J. MARK ROBINSON, DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION

Madam Chairman and Members of the Subcommittee:

My name is J. Mark Robinson, and I am the director of the Office of Energy Projects at the Federal Energy Regulatory Commission. Our office is responsible for non-federal hydroelectric licensing, administration, and safety; certification of interstate natural gas pipelines and storage facilities; and, authorization and oversight over the construction, operation, and safety of Liquefied Natural Gas (LNG) terminals.

I appear today as a Commission staff witness speaking with the approval of the Chairman of the Commission. The views I express are my own and not necessarily those of the Commission or of any individual Commissioner.

I appreciate the opportunity to comment on S. 2028 and S. 2035. S. 2028 would reinstate the license and extend until December 31, 2007 the deadline for the commence-

ment of project construction for the Tygart Dam Project No. 7307, located in West Virginia. S. 2035 would provide for reinstatement of the license and extend the deadline for the commencement of project construction for the Arrowrock Project No. 4656, located in Idaho, for a three-year period from the enactment of the legislation.

Under Part I of the Federal Power Act (FPA), the Commission issues licenses to non-Federal interests authorizing the construction, operation and maintenance of water power projects on federal lands, on navigable waters of the United States, which utilize the surplus water or water power from a federal dam, and on streams over which the Congress has jurisdiction. Licenses may be issued under the FPA only if, in the judgment of the Commission, the proposed project is best adapted to a comprehensive plan for the development and utilization of the water resources of the river basin involved for all public purposes. The licenses are issued for terms of up to 50 years and contain terms and conditions that are designed to ensure that the comprehensive development standard is met.

The FPA requires that the licensee will proceed expeditiously with the development and construction of the proposed project once a license has been issued. Section 13 of the FPA requires that construction of a licensed project be commenced within two years of issuance of the license and authorizes the Commission to extend this deadline once, for a maximum of two additional years. If project construction has not commenced by the deadline, the Commission is required to terminate the license.

ARROWROCK PROJECT

S. 2035 would provide for license reinstatement and extend the deadline for the commencement of project construction for the Arrowrock Project No. 4656, located in Idaho, for a three-year period from the date of enactment of the legislation. The Arrowrock Project was licensed on March 27, 1989, to the Boise-Kuna Irrigation District, the Nampa & Meridian Irrigation District, the New York Irrigation District, the Wilder Irrigation District, and the Big Bend Irrigation District (Districts). The license gave the Districts the maximum two-year time permitted by Section 13 to start construction—that is, until March 26, 1991. On January 9, 1991, pursuant to Section 13, the Commission granted the Districts' request for the one additional two-year extension to commence construction permitted by the statute, thereby extending the deadline for commencement of construction to March 26, 1993.

Section 1701(c) of the Energy Policy Act of 1992 subsequently authorized the Commission to extend the deadline for commencement of construction of the project for an additional six years, until March 26, 1999. The Commission granted this extension.

On March 23, 1999, three days prior to the expiration of the extended deadline, the Districts requested a stay of the commencement of construction and compliance deadlines,

while they sought Congressional legislation permitting further extensions of the construction deadline. The Commission denied that request, and on May 19, 1999, issued an order noticing probable termination of the license for failure to meet the commencement of construction deadline.

In June, 1999 legislation was introduced in the Senate (S. 1236) authorizing a further extension of the Section 13 deadline for the project until March 26, 2005. Former Commission Chairman James Hoecker submitted written testimony to the Senate Energy and Natural Resources Committee on July 28, 1999 stating that because this bill would extend the construction commencement date beyond 10 years from the issuance date of the project license, he did not support its enactment.

This legislation, which was subsequently enacted and signed into law in October, 2000 as Public Law No. 106-343, authorized the Commission, upon the Districts' request, to reinstate the license, if necessary, and to further extend the deadline for commencement of construction for three consecutive two-year periods, to take effect on the date of the expiration of the last extension issued by the Commission (i.e., as of March 26, 1999).

As requested by the Districts, the Commission thereafter granted three extensions, making the new final deadline for starting construction March 26, 2005.

On March 25, 2005, the Districts filed a request for a stay of the license, and to backdate the stay for 120 days to allow them time to comply with license articles containing requirements that must be completed before start of construction.

On May 27, 2005, the Commission denied the request for stay of license and, in the same order, issued notice of the probable termination of the project license. The Commission denied rehearing by order issued September 1, 2005.

S. 2028 AND S. 2035

I do not support either S. 2028 or S. 2035. Grafton had more than 11 years after license issuance to begin construction on the Tygart Dam Project, following which it failed to make substantial progress during the term of one three-year preliminary permit, and had a second permit application dismissed for the failure to provide adequate information.

The Districts have had more than 16 years after license issuance to start construction of the Arrowrock Project, and have been unable to do so. The licensee has cited numerous reasons for their delays, ranging from inability to obtain financing or a power sales agreement to several technical redesigns of the project.

As a general matter, enactment of bills authorizing or requiring commencement of construction extensions for individual projects leaves the development of an important energy resource in the hands of an entity that has shown an inability to develop a project, and therefore has not been recommended. The last several Chairmen of the Com-

mission have had a policy of opposing legislation extending commencement of construction deadlines that would allow an entity more than 10 years to develop a project. This policy has been based on the notion that allowing an entity that is not showing progress in developing a project to control a hydropower site for a greater length of time is not consistent with the public interest in developing clean, renewable hydroelectric energy.

Recent Commission orders have also noted that the purposes of the provisions of Section 13 of the FPA are to require prompt development of a licensed project. These instances demonstrate why that policy makes sense.

In addition, the record on which the projects were originally licensed in the 1980s, including the examination of environmental and developmental issues, may be out of date in various respects. For example, in the case of the Arrowrock Project, in 1998, after the license was issued, the U.S. Fish and Wildlife Service listed the Columbia River bull trout as a threatened species pursuant to the Endangered Species Act, for the stream on which the project is located. The Service has requested that endangered species consultation be conducted for that project. To ensure that the public interest is served would require not simply reinstating the license and/or extending the license timeframes for commencement of construction, but reexamining and, as necessary, updating the record.

I appreciate the opportunity to present my views to the Subcommittee. Thank you.

MINORITY VIEWS OF SENATOR JEFF BINGAMAN

The Federal Power Act authorizes the Federal Energy Regulatory Commission to grant licenses for the construction and operation of hydroelectric projects on navigable waters. Section 13 of the Act requires the licensee to begin construction of a project within two years from the date of the license. The Commission may extend the deadline for beginning construction, but only once, and for no more than two additional years. If the licensee fails to begin construction within the statutory period, section 13 requires the Commission to terminate the license. 16 U.S.C. 806.

The purpose of the time limitations in section 13 is to ensure the prompt development of the licensed project. As the Commission has correctly observed, "Congress has . . . expressed, in language too clear for misinterpretation, its will that . . . the maximum combined periods which may be allowed for the commencement of construction is 4 years." *Empire District Electric Co.*, 1 FPC 15, 19 (1932). Nonetheless, Congress has routinely enacted bills to extend the deadline for individual projects to begin construction on a case-by-case basis.

In commenting on several such bills in 1995, the Chairman of the Commission objected, "as a matter of policy . . . to granting a licensee more than ten years from the issuance date of the license to commence construction." She testified that "ten years is a more than reasonable period," and thought that if a licensee could not begin construction within ten years, "the license should be terminated pursuant to section 13 of the Federal Power Act. S. Hrg. 104-65 at 3. Although the Commission has never formally adopted the ten-year benchmark as an official Commission policy, subsequent chairmen have continued to apply it when commenting on license extension bills pending before the Committee.

Similarly, while the Committee has never formally adopted the ten-year benchmark as a binding Committee policy, it has continued to inform the Committee's consideration of license extension bills since it was first proposed eleven years ago. Indeed, to the best of my knowledge, since 1995, Congress has enacted only two laws (Public Law 104-241 and Public Law 106-343) extending the deadline for commencement of construction for more than ten years.

S. 2035 would extend the deadline for commencement of construction of the Arrowrock Project in Idaho. The Commission first licensed the Arrowrock Project on March 27, 1989. In accordance with section 13 of the Federal Power Act, the license required the licensee to commence construction within two years, namely by March 26, 1991. Shortly before the deadline, the Commission granted the licensee an additional two years, extending the deadline to March 26, 1993.

Congress has statutorily extended the deadline for the Arrowrock Project twice before. Section 1701(c) of the Energy Policy Act of 1992 authorized the Commission to extend the deadline for an additional six years, until March 26, 1999, a total of ten years from the issuance of the license. When the licensee failed to meet the new deadline, the Commission terminated the license on May 19, 1999. Congress subsequently ordered the Commission to reinstate the terminated license and to extend the commencement of construction deadline for six more years, until March 26, 2005, a total of 16 years from the original issuance of the license. The latest deadline expired more than a year ago.

Enactment of S. 2035 will extend the deadline for three additional years, until the latter half of 2009, more than 20 years after the original issuance of the license, more than ten times the original two-year period, more than five times the extended statutory limit, and more than twice the customary ten-year benchmark.

During the Committee's consideration of S. 2035, the Chairman stated that he was "not unsympathetic to the notion that there should be a finite amount of time for construction of these projects to begin." Even then, he added, the Committee ought to "allow for consideration of circumstances that might argue for a longer period when one of our colleagues presents us with a situation in their State that they believe merits additional consideration."

In this case, the licensee represents that the earlier deadlines were missed because the Fish and Wildlife Service had failed to consult under the Endangered Species Act in a timely fashion, but that everything is now in place, and it is ready to commence construction.

The Commission tells a different story. A year ago, the Commission found that construction had not commenced, not because of the fault of the Fish and Wildlife Service, but "because of the licensee's own actions or inactions." It found that the licensee had materially redesigned the project, necessitating a license amendment application, which had yet to be filed. It also said that the need for the endangered species consultation "is driven in large part" by the licensee's decision to "materially redesign the project." *Boise-Kuna Irrigation District*, 111 FERC ¶61, 271 (May 27, 2005) (order denying request for stay of license); 112 FERC ¶61, 240 (Sept. 1, 2005) (order denying rehearing). In addition, the Commission's witness testified on March 30, 2006 that the record on which the project was originally licensed "may be out of date in various respects," and that it may be necessary to reexamine and update the record.

In ordering S. 2035 reported, the Committee repudiates the ten-year benchmark that has guided the Committee over the past eleven years and sets an uncertain precedent. It is unclear what standard the Committee used in this case or expects to use in future cases to determine whether an extension is warranted. The Committee asked for no showing of special circumstances beyond the mere representations of the licensee that the delay was not its fault and that it is now ready, or soon will be, to begin construction. It gave no weight to the Commission's expert judgment that the licensee was at fault and is still not ready.

In my view, the time limitations in section 13 of the Federal Power Act serve the important public interest in the timely development of licensed hydroelectric power projects. As the Federal Power Commission long ago said, “the time limitations in section 13, prohibiting delays by licensees in constructing projects, and other provisions of the Act indicate a Congressional intent that water power resources be utilized in the best possible manner and at the earliest possible time.” *Idaho Power Co.*, 14 FPC ¶55, 68 (1955), *aff’d sub nom.*, *National Hells Canyon Ass’n v. FPC*, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1956). Those time limitations should not be laid aside lightly, for to do so “leaves the development of an important energy resource in the hands of an entity that has shown an inability to develop a project,” which “is not consistent with the public interest in developing clean, renewable hydroelectric energy.”

In deciding whether to exercise its discretion to grant the one-time two-year permitted under section 13, the Commission applies a very liberal standard. It will exercise its “discretion to grant the requested extension so long as it is not clearly unreasonable and capricious to do so.” *Maine Hydroelectric Development Corp.*, 15 FERC ¶61, 107 (1981). The ten-year benchmark previously recognized by the Committee afforded a similarly generous standard. It provided what amounted to a rebuttable presumption that extending the deadline for commencing construction by six more years (for a total of ten years from the issuance of the license) would not be unreasonable or capricious, but that any extension beyond that point would be.

I agree with Senator Domenici’s observation that the Committee ought to consider, on a case-by-case basis, whether special circumstances warrant giving a licensee more time. When special circumstances warrant relief, Congress ought to grant an extension. But when the licensee has already exhausted the Commission’s two-year extension and a statutory six-year extension (or, in this case, *two* statutory six-year extensions), the standard for granting further extensions ought to be a demanding one. Licensees should not be entitled to another extension on the mere representation that it is at long last ready to begin construction, especially where, as here, the Commission has testified otherwise.

To extend the deadline for the Arrowrock Project yet again, for three more years, after two prior statutory extensions of six years apiece proved unavailing, can only undermine the important statutory purpose of ensuring timely development of hydroelectric projects underlying section 13 of the Federal Power Act. I can find nothing in the record before the Committee to warrant another extension, and for that reason, I have voted against reporting S. 2035.

JEFF BINGAMAN.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 2035, as ordered reported.

